

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

FUSION ELITE ALL STARS, et al.,

Movants,

v.

REBEL ATHLETIC INC.,

Respondent.

Case No. 3:21-mc-00151-L

**PLAINTIFFS' MOTION TO STRIKE REBEL ATHLETIC INC.'S REPLY IN SUPPORT
OF ITS CROSS-MOTION TO QUASH AND FOR PROTECTION FROM PLAINTIFFS'
SUBPOENA DUCES TECUM OR, IN THE ALTERNATIVE, MOTION FOR LEAVE TO
FILE A SUR-REPLY**

COME NOW Plaintiffs Fusion Elite All Stars, Spirit Factor LLC d/b/a Fuel Athletics, Stars and Stripes Gymnastics Academy Inc. d/b/a Stars and Stripes Kids Activity Center, Kathryn Anne Radek, Lauren Hayes, and Janine Cherasaro (collectively, "Plaintiffs"), individually and on behalf of all others similarly situated, and respectfully move this Court to strike the Reply in Support of its Cross-Motion to Quash & for Protection from Plaintiffs' Subpoena Duces Tecum ("Reply Brief") submitted by Respondent Rebel Athletic Inc. ("Rebel") on August 27, 2021. (Dkt. 12.) Plaintiffs ask this Court, in the alternative, for leave to file a sur-reply responding to arguments raised by Rebel for the first time in its Reply Brief. In support of this motion, Plaintiffs state as follows:

1. Rebel argues that Plaintiffs' subpoena should be quashed because of the pendency of Rule 12(b)(6) motions in the underlying litigation, adopting Defendants' arguments that Plaintiffs did not properly define the product and geographic markets in their complain. (Dkt. 12 ¶¶5-7.) The Western District expressly rejected these arguments when it denied Defendants' motions in full 24 hours before Rebel filed its Reply Brief. (App'x Ex. 1

at 23.) Moreover, these arguments did not appear in Rebel's opening brief, Plaintiffs received no opportunity to respond, and they are improperly raised for the first time on reply. *Black Cat Expl. & Prod., LLC v. MWW Cap. Ltd.*, No. 1:15-cv-51, 2015 WL 12731751, at *3 (N.D. Tex. Apr. 29, 2015). Plaintiffs ask the Court to disregard these arguments or grant Plaintiffs the ability to respond to them in a sur-reply.

2. More importantly though, Rebel also asks this Court in its Reply Brief to impose sanctions on Plaintiffs for their alleged failure to comply with Rule 45. (*Id.* at 10-11.) Again, Rebel did not request such relief in its opening brief, Plaintiffs have had no opportunity to respond to the request, and it is therefore waived. *Burch v. Chase Bank of Texas NA*, No. 20-cv-00524, 2021 WL 281437, at *1 (N.D. Tex. Jan. 15, 2021).

3. Footnote 6 of Rebel's Reply Brief argues that Plaintiffs' motion to transfer should be denied. Rebel neither requested nor received leave to file such a sur-reply. It is merely an attempt to continue the cursory argument it lodged in its opposition to the motion to transfer, (Dkt. 7 at 23-24), and should be disregarded. *Racetrac Petroleum, Inc. v. J.J.'s Fast Stop, Inc.*, No. 01-cv-1397, 2003 WL 251318, at *18 (N.D. Tex. Feb. 3, 2003).

4. The Reply Brief violates Local Rule 7.2(a)'s requirement that font sizes be 12-point or larger. It includes 43 footnotes containing citation strings, parentheticals, and argument in a 10-point or smaller font size. It also includes a screenshot from the Subpoena in lieu of a simple quotation that is a page and a half in length and also a 10-point or smaller font size.

5. The Reply Brief also bleeds into an eleventh page by one line despite Rebel's attempts to camouflage its overlong and improper arguments. This, in combination with the subversive font size used in the Reply Brief's body and footnotes, violates the Court's mandate that reply briefs be no longer than 10 pages. L.R. 7.2(c).

For these reasons and those set forth in the Memorandum of Law in Support, Plaintiffs respectfully request that this Court grant the instant motion and strike the Reply Brief from the record. Should this Court choose to consider the new arguments made therein, Plaintiffs request leave to file a sur-reply and avoid any undue prejudice or injustice.

Dated: September 1, 2021

Respectfully submitted,

By: /s/ LSByrd
Lynette S. Byrd
Texas Bar No. 24047126
OBERHEIDEN, P.C.
440 Louisiana Street, Suite 200
Houston, Texas 77002
Fax: 972-559-3365
E-mail: lsb@federal-lawyer.com

Victoria Sims
CUNEO GILBERT & LADUCA, LLP
4725 Wisconsin Avenue NW, Suite 200
Washington, DC 20016
Telephone: (202) 789-3960
jonc@cuneolaw.com
kvandyc@cuneolaw.com
vicky@cuneolaw.com

Eric L. Cramer
Mark R. Suter
BERGER MONTAGUE PC
1818 Market Street, Suite 3600
Philadelphia, PA 19106
Telephone: (215) 875-3000
hlmontague@bm.net
ecramer@bm.net
msuter@bm.net

Gregory S. Asciolla
Karin E. Garvey
Veronica Bosco
LABATON SUCHAROW LLP

140 Broadway New York, NY 10005
Telephone: (212) 907-0700
gasciolla@labaton.com
kgarvey@labaton.com
vbosco@labaton.com

Attorneys for Plaintiffs

CERTIFICATE OF CONFERENCE

In accordance with Local Rule 7.1(a), counsel for Plaintiffs, Katherine Van Dyck, conferred with counsel for Rebel on September 1, 2021 regarding the motion to strike and, in the alternative, for leave to file a sur-reply. Counsel for Rebel has stated his client is opposed to the relief sought in Plaintiffs' motion.

/s/ LSByrd

Lynette S. Byrd

CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2021, the foregoing document was filed with the court via the Electronic Case Filing (ECF) system and duly served in accordance with the provisions of Rule 5 of the Federal Rules of Civil Procedure, by electronic mail, to the following recipients:

John David Blakley
Dunn Sheehan LLP
3400 Carlisle Street, Suite 200
Dallas, Texas 75204
jdblakley@dunnsheehan.com

Attorney for Rebel Athletic Inc.

Adam S. Baldridge
Matthew S. Mulqueen
BAKER DONELSON BEARMANN CALDWELL
& BERKOWITZ
165 Madison Ave Ste 2000
Memphis, TN 38103
Tel: 901-526-2000
abaldridge@bakerdonelson.com
mmulqueen@bakerdonelson.com

George S. Cary
Mark W. Nelson
Alexis Collins
Steven J. Kaiser
CLEARY GOTTFLEB STEEN & HAMILTON
LLP
2112 Pennsylvania Avenue NW Ste 1000
Washington, DC 20037
Tel: 202-974-1500
gcary@cgsh.com
mnelson@cgsh.com
alcollins@cgsh.com
skaiser@cgsh.com

*Attorneys for Varsity Brands, LLC, Varsity Spirit
Fashions & Supplies, Inc., and Varsity Spirit, LLC*

Grady M. Garrison
Nicole D. Berkowitz
BAKER DONELSON BEARMAN CALDWELL
& BERKOWITZ, P.C.

165 Madison Ave. Ste. 2000
Memphis, TN 38103
Tel: 901-526-2000
ggarrison@bakerdonelson.com
nberkowitz@bakerdonelson.com

*Attorneys for Defendant U.S. All Star Federation,
Inc.*

/s/ LSByrd

Lynette S. Byrd